IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 626 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NARSINGBHAI NATHABHAI RAJPUT

Versus

STATE OF GUJARAT

Appearance:

MR DEEPAK M SHAH for Petitioner

MR BD DESAI, APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

and

MR.JUSTICE H.H.MEHTA

Date of decision: 07/02/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE C.K.BUCH)

1. This is an appeal filed by a lifer

convict-appellant who by the judgment dated 18.4.1992, has been held guilty for the offence punishable under sec.302 of IPC at the end of trial of Sessions Case No. 106/91 conducted by ld. Addl. Sessions Judge, Baroda.

2. The facts of the prosecution case, in brief, are that the appellant-accused (hereinafter referred to as the "Accused") has killed his wife by setting her on fire. That the accused was a drunkard and the victim wife Kantaben was asking him not to consume liquor. On the fateful day i.e. on 5.4.1991, there was a quarrel between the accused and Kantaben and Kantaben was beaten by the accused. She had taken shelter at the place of her sister Sushila, but in the late evening on that day, accused went to the house of Sushilaben and forced his wife Kantaben to return to home along with two son. Family of the accused viz. accused, his wife Kantaben and two minor sons were residing in the hutment situated near Kalali Fatak, known as Santoshi Vasahat in Vadodara city. After return to the hutment, at about 20.00 Hrs., because of quarrel between the accused and Kantaben, accused poured kerosene on her body and set her on fire by a matchstick. Kantaben sustained 95% burns of 2nd and 3rd degree on her body. Hut of the accused also caught fire. Kantaben, with a view to save herself and to extinguish fire, embraced accused and therefore, accused also sustained burn injuries on some part of his body. Neighbours including P.W. Natvaralal rushed to the spot and arranged for Ambulance from Fire Brigade of City of Baroda. Kantaben and the accused both were taken to Sayaji Hospital at Vadodara where both were admitted as indoor patients. During treatment, responsible police officer visited the hospital and recorded complaint of Kantaben and arranged for recording of Dying Declaration ("DD" for short) of Kantaben by the Executive Magistrate. Executive Magistrate recorded DD of Kantaben in the hospital at about 0.32 Hrs on 6.4.1991 i.e. immediately after the midnight of 5.4.1991. After some time of recording of DD, Kantaben succumbed to the injuries sustained by her and died at about 2.35 A.M. At the end of investigation, police chargesheeted the accused for the offence punishable under sec.302 of IPC and the accused was committed to the Court of Sessions, Vadodara Ld. Addl. Sessions Judge, Baroda, at the conclusion of the trial, has held the accused guilty for the offence punishable under sec.302 of IPC and sentenced him to suffer R/I for life. Of course, ld. Addl. Sessions Judge has not imposed any fine, though statutorily required. Hence, present appeal by the appellant accused.

3. Mr.D.M.Shah, learned counsel appointed by this

Court at the request of the appellant-accused, has submitted that findings of the learned trial Judge are erroneous and in view of the deposition of defence witness- minor Dilip Narsingbhai (exh.28) and the fact that many important witnesses have not supported the case of the prosecution, ld. trial Judge ought to have given benefit of doubt to the accused. Ld. counsel Mr. Shah has taken us through entire oral as well as documentary evidence and has submitted that there was no reason for the ld. trial Judge to ignore the oral evidence of the defence witnesses. That in the light of non-corroboration by independent witnesses, though they were available and examined, ld. trial Judge ought not to have accepted the DD as a satisfactory evidence without there being any corroboration and, therefore, the appeal requires to be allowed.

4. Ld.APP Mr. B.D.Desai has strongly resisted the submissions made by ld. Counsel Mr. Shah for the accused and has submitted that the case of the prosecution is consistent and the same is established satisfactorily. Quarrel between accused and deceased immediately prior to the incident has been proved by the deceased through DD as well as by P.W. Sushila. On the contrary, it is in the evidence of defence witness also that in the late evening of 5.4.1991, deceased and both the sons including defence witness Dilip were at the house of P.W. Sushila and accused had gone to the house of P.W. Sushila and taken all the three i.e. deceased Kantaben and both minor sons and had gone to his hut where the incident has occurred. Offence is committed in couple of hours from their return to the hut. PSI Kanjibhai (exh.24) who had recorded DD of deceased Kantaben, has also proved the DD i.e. complaint. Initially, FIR was recorded by this witness, but on account of death of the complainant, complaint recorded by PSI Kanjibhai (exh.24) acquires status of a DD admissible in evidence under sec.32 of the Indian Evidence Act. P.W. Kanjibhai has been cross-examined at length. It is submitted by ld. APP Mr. Desai that defence side has miserably failed in bringing shadow of doubt over the genuineness of the crime and complaint recorded in the hospital and it is sufficient to link the accused with the crime. According to Mr. Desai, there was no reason for the ld. trial Judge to ignore the complaint -DD and the same is rightly and properly appreciated. Ld. APP Mr. Desai has pointed out that though there is no formal evidence by the prosecution as to the history given by victim Kantaben to the doctor who admitted Kantaben in the hospital, the case papers are tendered in evidence during the course of

cross-examination of P.W. Dr. Aziz Ahmed Vora (exh.22) at the instance of the accused and history recorded by the doctor in the case papers clearly says that Kantabena patient- had narrated the same story and it was recorded accordingly. Statement before the doctor was the first statement soon after the incident disclosing cause of injury sustained by her which has ultimately resulted into her death. So, the history recorded by the doctor can also be read in evidence, at least, as a corroborative piece of evidence. Hence, the complaint recorded by PSI Kanjibhai gets corroboration from the hospital case papers. It is satisfactorily established by the evidence of Dr. Aziz Ahmed Vora that the patient was conscious till the time when her DD was formally recorded by the Executive Magistrate. Exh.11 - police yadi, bears two different endorsements of the doctor. First endorsement indicates that when Yadi was sent, the investigating agency had verified that according to the doctor, patient was conscious. Time of recording of DD by Executive Magistrate is 0.32 Hrs. of 6.4.1991. Again one another endorsement was obtained on the same Yadi at about 01.10 Hrs. that the patient was conscious. Of course, there is a reference of unconsciousness of the patient in the case papers, but the same is at much latter than the endorsement made at 01.10 Hrs. Learned trial Judge seems to have appreciated all these aspects and has recorded finding against the accused. Ld. trial Judge has not committed any material error and, therefore, conviction should be sustained and appeal should be dismissed. He has further submitted that ld. trial Judge has rightly ignored the deposition of defence witness Dilip- son of the accused.He being a child witness and interested in the result of the case, his evidence was to be scrutinised closely. First reading of deposition of defence witness gives an impression that he was tutored and unnecessary mudsludging has been made by the defence side on deceased Kantaben. Ld. APP Mr. Desai, therefore, submitted that finding recorded by the ld. trial Judge is absolutely in accordance with law and does not require any interference.

5. We have considered rival contentions and arguments advanced by the ld. counsel appearing for the parties. We have gone through the case papers exh.23 very minutely and have considered various endorsements and notings made by the doctor who treated injured Kantaben. Deceased Kantaben had sustained 2nd & 3rd Degree burns to the extent of 95%. She was unfortunately examined at a very late stage in the hospital. However, she was found conscious. Before doctor could approach her, police had recorded complaint and had arranged to

see that Executive Magistrate reaches to the hospital at the earliest. History given by the patient to the doctor is very relevant. Document exh.23 i.e. case papers are brought on record by the defence counsel during the cross-examination of the witness. Mr. Desai has rightly submitted that history recorded in the case papers can be looked into by this Court. We are in agreement with the submission of ld. APP Mr. Desai that the prosecution case is consistent from the very beginning and say of deceased Kantaben is substantially corroborated by other speaking and attending circumstances. Burns injury sustained by the accused and the fact that he was also admitted in the hospital is relevant for the purpose. Injury on the bodoy of the accused normally is supposed to be explained by the prosecution and the complaint recorded by the police explains this injury. The Court is to hear a ring truth in the version of the deceased witness viz. Kantaben. It is settled legal position that if the Court is satisfied that DD is a genuine and trustworthy piece of evidence, in that case, without seeking other corroboration, accused can be convicted solely on the basis of such DD. In the instant case, ld. trial Judge has placed reliance on DD and based conviction, which in our opinion, is absolutely just and proper. Cause for quarrel is not important at all. Of course, the motive is specifically pleaded by the prosecution and the same is also satisfactorily proved. A shadow of doubt that defence has tried to bring over the theory of the prosecution, covers mainly motive part of the prosecution story and not the incident part. Theory put forward by the defence by examining minor child Dilip seems to be an after-thought. Though there is indirect evidence on record that on the date of incident, defence witness Dilip must be around the age of 5 or 6 years, however on the date of deposition, this witness has stated before the Court that his age is of 5 years. Ld. trial Judge has not cared to verify as to whether he is able to give deposition on oath and is able to understand the sanctity of the oath if given by the Court in a court proceedings. We have not found any such formal questions having been asked in the deposition of the defence witness Dilip. The mode of recording of evidence of a child witness is not proper and satisfactory. A young boy of 5 or 6 years has narrated the story chronologically and in a sequence consistent with prosecution case. However, during the course of cross-examination, this witness has not stood to the test. He being a son, close relative of the accused , is a partisan witness and his evidence was required to be scanned and scrutinised closely. Certain sentences in the deposition of this witnesses are indicative of the

fact that he must have been tutored. His version is found unnatural. Material part of his deposition is based on inferences. Something is stated by this witness for which he probably was not competent to say, e.g. he could not have said that his father had thought in a particular way and, therefore, a particular incident occurred. Alleged conspiracy hatched by deceased Kantaben and "Thakor Masa" narrated by this witness is totally foreign to the entire prosecution case and is found unnatural.

6(i) The Apex Court, in the case of Sataji Nathaji & Ors. v/s State of Gujarat, reported in (1976) XVII GLR P.254, has observed ".... there is no legal requirement to hold preliminary examinatin to determine the competence of a child witness. However, holding of preliminary examination and maintenance of record thereof is still an established rule of practice. Absence thereof is a handicap in the process of assessment of evidence." This is an infirmity as per the rule of prudence. The above principle is also referred to by this Court in the decision in the case of Koli Nana Bhana & Ors. v/s State of Gujarat, reported in 1984 GLH P.1055.

(ii) We would also like to reproduce the observations made by this Court in the case of Hashmukhbhai Devjibhai Khavasa v/s State of Gujarat, reported in 1997(1) GLH P.102. In the said decision, in para-30, it has been observed as under :-

> "30. ..... She was a child witness of about 11 years at the relevant time. Her evidence has not been recorded on oath as she ws found not to understand the sanctity of oath in her preliminary inquiry in in that regard. In fact, as transpiring from the preliminary inquiry in that record, she even could not give the name of her school. In her cross-examination, she weas unable to give names of her classmates also. She could not give the name of her grandfather or those of her cousins though they were four in number. She could not give the name of her younger uncle either. She could not say the number of pupils in her classroom. She could not even say what a friend would mean. And yet she could name the appellant-accused and the police constable who took her to the Public Prosecutor's office for the purpose of recording her deposition. This by itself, would go to show and to suggest that she was a tutored witness. ... .".

We cannot ignore the effect of the above principle while appreciating the evidence of P.W. Dilip.

(iii) In some cases, hostility of certain important witness or witnesses would not affect adversely to the structure or substratum of prosecution case but support by very such witness may strengthen the prosecution theory and may render additional strength to the prosecution case.

7. It seems that by way of last minute efforts, mudsludging against deceased Kantaben has been made by the defence side. Statement of deceased Kantaben made before the police and the Executive Magistrate, get corroboration from the presence of P.W. Natvarlal and deposition of Sushila. According to us, though neighbours have turned hostile and Ambulance driver has not supported the prosecution case, it would not have been proper for the trial Court to conclude against the prosecution. Prosecution case mainly rests on DD and other relevant attending circumstances. Evidence of other witnesses who were named and examined by the prosecution, was led with a view to get additional support. Absence of support by such witnesses would not adversely affect the case of the prosecution. Prosecution could have produced injury certificate of accused, but other evidence led by the prosecution is sufficient to establish one fact that accused had sustained burn injuries during the incident not while attempting to save his wife. He was not found outside the hut because he had gone inside to save Kantaben. As the whole hut had caught fire, he was compelled to come out. Panch witnesses were examined by the prosecution as their examination was mere a procedural requirement. Genuineness of the panchanama is not substantially challenged by the defence side otherwise I.O. could have been cross-examined at length on this aspect. Inquest panchanama, scene of offence panchanama etc., according to us, are formal pieces of evidence in this case. Of course, this evidence is important to evaluate the cause and nature of injury sustained by victim Kantaben. Hence, even absence of support to the prosecution case by the panch witnesses also would not help the accused in this case. In nutshell, we are in agreement with the reasonings given by the ld. trial Judge holding the accused guilty as the same are just, proper and based on correct appreciation of oral as well as documentary evidence available on record. When we are in agreement with the reasons assigned by the ld. trial Judge, as per the settled legal position, we are not supposed to give our own reasons. However, to appreciate the case of the defence side and appellant before this Court, we have scanned the evidence led by the prosecution and we

express our confirmity with the finding recorded by the ld. trial Judge. We do not see any reason to interfer with the finding and hence, as there being no merit in this appeal the same requires to be dismissed.

8. For the reasons aforesaid, appeal is dismissed. Impugned judgment dated 18.4.1992 passed by ld. Addl. Sessions Judge, Baroda in Sessions Case No. 106/91 convicting the accused for the offence punishable under sec.302 of IPC and sentencing him to suffer R/I for life is hereby confirmed. We are told that accused is in jail. Hence, no formal orders as to his surrender to jail custody are passed.

07.02.2001 [C.K. BUCH, J]

[H.H. MEHTA, J]

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